

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RANDY BAZEMORE,	:	CIVIL NO. <b>3:05-CV-1089</b>
	:	
Petitioner	:	(Judge Kosik)
	:	
v.	:	(Magistrate Judge Smyser)
	:	
SUPERINTENDENT, S.C.I FOREST,	:	
	:	
Respondent	:	

**ORDER**

On May 31, 2005, the petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

By an Order dated June 2, 2005, we gave the petitioner the notice required by *Mason v. Meyers*, 208 F.3d 414 (3d Cir. 2000), and ordered the petitioner to inform the court on or before June 22, 2005 whether he wants (1) to have his petition ruled upon as filed; (2) if his pleading is not styled as a § 2254 petition, to have his pleading recharacterized as a § 2254 petition and heard as such, but lose his ability to file a second or successive petition absent certification by the court

of appeals as required by 28 U.S.C. § 2244(b); or (3) to withdraw his petition and file one all-inclusive petition within the one-year statutory period prescribed in 28 U.S.C. § 2244(d). On June 24, 2005, the petitioner filed a response to our June 2, 2005 Order. The petitioner stated that he wants to proceed with his current *pro se* petition.

By an Order dated July 1, 2005, the respondent was ordered to respond to the petition on or before July 21, 2005. The Order of July 1, 2005 provided that the petitioner may file a reply to the response within ten days of its filing.

The respondent sought and was granted leave to file, on or before August 9, 2005, a partial answer to the petition addressing only the question of whether the petition is barred by the statute of limitations. On August 9, 2005, the respondent filed a partial answer to the petition and a brief arguing that the petition is barred by the statute of limitations.

28 U.S.C. § 2244(d) provides:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The respondent contends that the petition is barred by 28 U.S.C. § 2244(d) (1) (A) on the basis that the petition was not filed within one year of the date the petitioner's conviction and sentence became final. The details surrounding the procedural history of the proceedings in state court are

sketchy. The respondent asserts that the following sequence took place.

In 1993, the petitioner was convicted in the Court of Common Pleas of Dauphin County of robbery and criminal homicide. He was sentenced to life imprisonment. On March 11, 1994, the trial court denied the petitioner's post-sentence motion. The petitioner did not file a direct appeal. The petitioner filed a petition for collateral relief under Pennsylvania's Post Conviction Relief Act. That petition was denied on March 20, 1996. On May 21, 2003, the petitioner filed a notice of appeal from an order issued on May 15, 2003.<sup>1</sup> On November 13, 2003, the Superior Court of Pennsylvania quashed the petitioner's appeal. The petitioner did not seek relief in the Supreme Court of Pennsylvania relating to the quashing of his appeal.

The respondent assumes that the petitioner's conviction became final on December 13, 2003 - thirty days after the

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<sup>1</sup> The respondent has not provided the court with a copy of the Order of May 15, 2003 or any other orders or opinions from the state courts. Nor has the respondent described the contents of the Order of May 15, 2003 or to what the Order of May 15, 2003 relates.

November 13, 2003 order of the Superior Court quashing the petitioner's appeal. The respondent concludes that the petitioner had until December 13, 2004 to file a federal habeas petition and that since the instant petition was not filed until May 31, 2005, the instant petition is untimely. The respondent also contends that there is no basis for statutory or equitable tolling of the statute of limitations.

The respondents have not provided the court with the orders and opinions of the state court relating to the petitioner's conviction and sentence. Thus, the court is not able to make the calculations necessary to determine with any confidence whether the statute of limitations bars one or more of the claims in this case. Moreover, the respondents only address whether the petition is timely pursuant to 28 U.S.C.

§ 2244(d)(1)(A). The petitioner, however, intimates that pursuant to 28 U.S.C. § 2244(d)(1)(D) the statute of limitations did not begin to run on at least some of his claims until the date on which he reasonably discovered the factual predicate of those claims. The date on which the factual predicate of the claim or claims presented could have been discovered through the

exercise of due diligence is not clear from the record in this case. Because the court has not been provided with a record sufficient to determine the statute of limitations questions presented in this case, we will appoint counsel to represent the petitioner and brief the statute of limitations issue.

On October 3, 2005, the petitioner filed a motion entitled "Motion for Relief from Denied Access to the Courts." The petitioner contends that he is being denied access to the prison law library. Since we will appoint counsel to represent the petitioner and, therefore, the petitioner will not need to research issues relating to this case in the law library, we will deny as moot the petitioner's motion.

Also pending in this case is a motion filed by the petitioner entitled "Motion to Suppress Material and Physical Evidence." We will deny this motion without prejudice to the petitioner's counsel filing any motions he or she deems appropriate.

Also pending in this case is a motion filed by the petitioner entitled "Petitioner's Motion to File a Partial Answer." That motion will be granted to the extent that the court has considered the arguments made by the petitioner in that motion and his subsequent briefs.

**IT IS HEREBY ORDERED** that the petitioner's motion (doc. 17) for the appointment of counsel is **GRANTED** and the Federal Public Defender, 100 Chestnut Street, Suite 306, Harrisburg, Pennsylvania, 17101, telephone (717) 782-2237, is appointed to represent the petitioner. **IT IS FURTHER ORDERED** that within twenty days of the date of this order counsel for the petitioner shall file a brief addressing the statute of limitations. The respondent shall file a brief in opposition to the petitioner's brief within fifteen days after the petitioner's brief is filed. The petitioner may file a reply brief within ten days of the filing of the respondent's brief in opposition. **IT IS FURTHER ORDERED** that the petitioner's motion (doc. 30) for relief from denial of access to the courts and the petitioner's motion (doc. 6) to suppress are **DENIED**. **IT IS FURTHER ORDERED** that the

petitioner's motion (doc. 21) to file a partial answer is **GRANTED** to the extent that the court has considered the arguments made by the petitioner in that motion and his subsequent briefs.

/s/ J. Andrew Smyser

J. Andrew Smyser

Magistrate Judge

Dated: October 19, 2005.